94

(3)

No. 07-487

FILED

FEB 25 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

DERICK ANTHONY HENRY,

Petitioner,

v.

ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA (BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT),

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF OF PETITIONER

JOHN E. MCKEEVER
Counsel of Record
RONALD P. SCHILLER
JACQUELINE R. DUNGEE
KRISTIN M. BARRETT
LAURA A. BIANCKE
Attorneys for Petitioner Derick Anthony Henry

DLA PIPER US LLP
One Liberty Place, Suite 4900
1650 Market Street
Philadelphia, Pennsylvania 19103
(215) 656-3310

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

INTRODUCTION

This case concerns the correct interpretation of only one element of the definition of "crime of violence" in 18 U.S.C. § 16(b): the requirement that the crime present a substantial risk that physical force may be used "in the course of committing the offense." 18 U.S.C. § 16(b). The issue is whether Section 16(b) includes only those crimes which create a substantial risk that physical force may be necessary *in order to complete the offense*.

ARGUMENT

1. Respondent has focused solely on the fact that the crime at issue is possession of a weapon with intent to use it, as opposed to a "simple" weapons possession offense that does not include the "intent to use" element. Opp. at 6-15. While intent to use a weapon may convert a simple possession offense into a crime that presents "a substantial risk that force may be used," the increased likelihood of the use of force is, we submit, irrelevant to the question raised by this case: whether, as the Fifth Circuit has held, Section 16(b) includes only those crimes which involve a risk that force may be "necessary to effectuate" the crime. *See, e.g., United States v. Medina-Anicacio*, 325 F.3d 638, 646 (5th Cir. 2003), *reh'g denied*, 91 Fed. Appx. 975 (5th Cir.), *cert. denied*, 542 U.S. 911 (2004). Like simple possession offenses, possession of a weapon with intent to use it does not

present any risk that the offender may need to use force in order to perpetrate the possession offense itself.

The court of appeals in this case relied almost exclusively on the fact that Petitioner's offense included the "intent" element. It held that its prior decision in *Impounded*, 117 F.3d 730 (3d Cir. 1997), was dispositive because of the intent element alone. App. at 12-15. However, in *Impounded*, the court of appeals did not address the "in the course of committing the offense" language. It made no distinction between decisions interpreting Section 16(b)'s definition of "crime of violence" and other decisions involving provisions that do not include the "in the course of committing the offense" (or other similar) language, and relied upon both types of decisions interchangeably in its brief analysis. *Impounded*, 117 F.3d at 738. Thus, both *Impounded* and the decision below necessarily failed to give any effect to the "in the course of committing the offense" requirement.

The decision below and *Impounded* both expressly recognize that the intent element of the offense at issue here really goes to whether the risk that physical force may be used is "substantial," not to whether that risk arises "in the course of committing the offense." App. at 12 (stating that the court was "bound by" its prior "analysis that the intent to use creates a substantial risk of the use of physical force . . . "); *Impounded*, 117 F.3d at 738 ("[c]ertainly if someone intends to use a dangerous weapon then there is 'substantial risk that physical force . . . may

be used'"). In contrast, the Fifth Circuit has given effect to all of Section 16(b)'s requirements, holding that neither possession of a concealed dagger nor possession of a short-barrel firearm is a "crime of violence" – despite their almost exclusively violent uses – because there is "no substantial risk that an offender may use violence *to perpetrate the weapon possession offense*." *Medina-Anicacio*, 325 F.3d at 647 (emphasis added); *United States v. Diaz-Diaz*, 327 F.3d 410 (5th Cir.), *cert. denied*, 540 U.S. 889 (2003).

2. Respondent argues that the Fifth Circuit's (and our) interpretation of "in the course of committing the offense" is too narrow because it would exclude burglary. Opp. at 7-8; *see also* App. at 15-16. This is incorrect. We recognize that burglary is the "classic" example of a Section 16(b) crime of violence. Pet. at 15. Moreover, this Court has noted that burglary is covered by Section 16(b) "*not* . . . because someone may be injured, but because burglary, by its nature, involves a substantial risk that the burglar will use force against a victim *in completing the crime*." *Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004) (first emphasis in original; second emphasis added). Rather than excluding burglary from Section 16(b)'s definition of "crime of violence," the Fifth Circuit's (and our) interpretation of "in the course of committing the offense" mirrors that assumed by this Court in explaining why burglary is a "classic example" of a Section 16(b) crime of violence. *Id.* In contrast, there is no risk that a weapons possession offender – regardless of intent – will need to use force "in completing the [possession] crime." *See id.*

3. Contrary to Respondent's argument, Opp. at 13-15, the disagreement among the courts of appeals with respect to the meaning of the phrase "in the course of committing the offense" contained in the "crime of violence" definition in the Bail Reform Act, 18 U.S.C. §§ 3141-56, has not been resolved by Congress. Although the Bail Reform Act now specifically allows the government to move for pretrial detention of both individuals who commit "crimes of violence" and those who commit "any felony that is not otherwise a crime of violence" which involves the possession of firearms or other dangerous weapons, 18 U.S.C. § 3142(f)(1)(E), the Bail Reform Act amendment did not affect what offenses constitute "crimes of violence" or change the meaning of the phrase "in the course of committing the offense." Although it is now clear that the government may move for pretrial detention in even "simple" weapons possession cases, the Court's guidance in interpreting the "in the course of committing the offense" language is still needed to ensure the consistent enforcement of both the Bail Reform Act and statutes that incorporate Section 16(b).

4. Respondent is mistaken in stating that the Ninth Circuit's decision in *United States v. O'Neal*, 937 F.2d 1369 (9th Cir. 1991), is "no longer good law." Opp. at 13. Although the sentencing guideline at issue in *O'Neal* no longer incorporates Section 16's "crime of violence" definition, the *O'Neal* court nevertheless interpreted Section 16(b), and the court's holding that conviction of a felon for even "simple" possession is a "crime of violence" under Section 16(b)

remains the law in that circuit. The Ninth Circuit's later statement (*see* Opp. at 13) that *O'Neal* improperly ignored the Sentencing Guidelines Commentary has no effect on the validity of *O'Neal's* interpretation of Section 16(b) outside of the sentencing context.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN E. MCKEEVER
Counsel of Record
RONALD P. SCHILLER
JACQUELINE R. DUNGEE
KRISTIN M. BARRETT
LAURA A. BIANCKE
Attorneys for Petitioner
Derick Anthony Henry

DLA PIPER US LLP
One Liberty Place, Suite 4900
1650 Market Street
Philadelphia, Pennsylvania 19103
(215) 656-3310